STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2014
v	No. 318368 Oakland Circuit Court
CURTIS M. BRAGG, Defendant-Appellant.	LC No. 2011-236421-FC

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and armed robbery, MCL 750.529. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to life imprisonment for the murder conviction, and concurrent prison terms of 40 to 60 years each for the conspiracy and armed robbery convictions. Defendant appeals as of right. For the reasons explained below, we affirm.

Defendant's convictions arise from the death of Demetrius Lanier during an armed robbery on January 26, 2010, in Southfield. The prosecution's principal witness, Richard Shannon, had rented two apartments at the North Park Towers, one on the eleventh floor and the other on the sixth floor, from where Lanier fell to his death from a sixth-floor balcony. Throughout the day on January 26, Shannon had several cellular telephone communications with codefendant Damon Bostick to arrange a marijuana transaction. At some point that day, Lanier accompanied Shannon back to Shannon's sixth-floor apartment. Bostick later arrived with defendant and a third unidentified man. After Shannon displayed the marijuana for inspection, defendant and his associates gestured as if they were pulling out money, but they instead pulled out handguns. Defendant pointed his gun at Lanier and ordered him to the ground. After a brief struggle, Shannon was subdued and bound with duct tape by Bostick and the unidentified man. Bostick demanded the location of the rest of Shannon's marijuana. Lanier was panicky and stated that more marijuana was in an upstairs apartment. Upon leaving the apartment, Bostick cautioned Lanier that if the marijuana was not there, he would call and instruct defendant to shoot Lanier. When defendant's cellular telephone rang minutes later, Lanier got up, and then he and defendant engaged in a struggle that migrated through an open door to the balcony. Although Shannon could not see what was happening outside, he heard a skirmish and heard defendant state, "oh, sh*t." Defendant and the unidentified man then fled the apartment.

Lanier's body was discovered on the ground below. Lanier later died from injuries received during his fall from the balcony.

I. MISTRIAL

Defendant first argues that the trial court erred by denying his motion for a mistrial based on two instances of juror misconduct. In particular, defendant asserts that juror misconduct necessitating a mistrial occurred because: (1) a juror, who was ultimately excused as an alternate, notified the court that she recalled seeing a news broadcast three years earlier which reported that defendant had been apprehended in Ohio, and (2) the trial court was advised that the court clerk had overheard a juror or jurors mention the name "Shannon," suggesting that the jurors may have been discussing the case amongst themselves.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes." *Id.*

A criminal defendant has a constitutional right to be tried by an impartial jury. U.S. Const, Am VI; Const 1963, art 1, § 20. However, "[j]urors are presumed to be impartial until the contrary is shown," and "[t]he burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008) (alteration, quotation, and citation omitted). Misconduct on the part of a juror does not automatically require a new trial. *Id.* at 551. A mistrial based on juror misconduct should be granted only if "the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. A new trial will not be granted if no substantial harm was done thereby to the defendant, even though the misconduct may merit a rebuke from the trial court if brought to its notice." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

In the first instance of juror misconduct, a juror, who was ultimately excused before deliberations, notified the court that she had recalled seeing a news broadcast three years earlier that defendant had been "picked up" in Ohio. From questioning of the juror and the court clerk, it was unclear whether the juror had shared the particular information with her fellow jurors, and defense counsel did not request that the other jurors be questioned. For purposes of deciding defendant's motion for a mistrial, however, the court presumed that the juror had shared this information with other jurors.

It is true that, to protect a defendant's right to a fair and impartial jury, "jurors may only consider the evidence that is presented to them in open court." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). However, a jury's mere exposure to extrinsic evidence does not necessarily mandate a new trial. See *id.* at 88-89. To establish that the extrinsic influence requires reversal, the defendant must prove that the jury was exposed to an extraneous influence that created a "real and substantial possibility" that it could have affected the jury's verdict. *Id.* To do so, the defendant must show that the extraneous influence is "substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89.

Here, there is no suggestion that the newscast observed by the juror directly addressed defendant's guilt or innocence, or was substantially related to any material aspect of the case. Apparently, the juror learned nothing more than that defendant had been "picked up" in Ohio. The juror in question indicated that her judgment would not be affected by the newscast, and she was in fact dismissed as an alternate before deliberations. Cf. *People v Grove*, 455 Mich 439, 472, 475-476; 566 NW2d 547 (1997), superseded by statute on other grounds as stated in *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012). While the trial court presumed that the information had been shared with other jurors, it also reasonably concluded that any shared information had "not infected nor polluted or contaminated this jury's objectivity preceding the Court's final instructions." Moreover, during its preliminary instructions, the trial court instructed the jurors that they were not to consider evidence that came from anywhere other than the courtroom, including news reports. Before deliberating, the trial court instructed the jurors that they were to base their verdict "only on the evidence admitted during the trial" and that "any personal knowledge about a place, person or event" was not to play any role in their decision-making process. The court's instructions limited the potential for any prejudice, and juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). See also *Grove*, 455 Mich at 476. Overall, on the facts of this case, one juror's viewing of a news broadcast, from which she learned nothing more than that defendant had been "picked up" in Ohio, did not necessitate a mistrial.

In the second instance of alleged juror misconduct, the trial court was advised that the court clerk had overheard a juror or jurors mention the name "Shannon." Defendant maintains that this discussion demonstrates that the jurors were discussing the case, contrary to the trial court's instructions. Absent a showing of prejudice to the defendant, a violation of the trial court's instructions not to discuss a case during the trial, except with other jurors during deliberations, is generally not a ground for a new trial. *People v Harris*, 190 Mich App 652, 662; 476 NW2d 767 (1991); *People v Rohrer*, 174 Mich App 732, 739-740; 436 NW2d 743 (1989). "The proper remedy is for the court to review the alleged violation to determine whether or not the jurors' impartiality had been affected by the jurors' discussion." *Rohrer*, 174 Mich App at 737.

Here, although the mere mention of Shannon's name might have merited rebuke from the trial court, defendant has failed to set forth any facts that clearly establish an inference that he was actually prejudiced. The court clerk reported hearing only the name Shannon, with no other information, and at that time the clerk reminded the jurors of the trial court's instructions about discussing the case. As the trial court recognized, the parties declined to question the jurors and the extent of any further discussion was thus unknown. After the matter was disclosed, the trial court reminded the jurors that they were not to "talk about the case amongst yourself [sic] or with anybody else."[1] See *Graves*, 458 Mich at 486. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

[1] In addition, we note that the trial court offered to provide a special cautionary instruction to the jury to further dispel any possible prejudice. Defendant, however, declined the trial court's offer. A defendant may not harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206,

II. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that his conviction for first-degree felony murder must be vacated because the prosecution failed to present sufficient evidence of malice.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First-degree felony murder requires proof that the defendant killed the victim with malice, while committing, attempting to commit, or assisting in the commission of a felony specifically enumerated in MCL 750.316(1)(b). *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Malice may be inferred from the facts and circumstances of a killing, including the use of a deadly weapon, and a "jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). "[T]he intentional commission of a felony such as armed robbery . . . usually involves the conscious creation of a very high degree of risk of death with knowledge of its probable consequences." *People v Craig*, 66 Mich App 406, 410; 239 NW2d 390 (1976). See also *People v Aaron*, 409 Mich 672, 729-730; 299 NW2d 304 (1980) ("[W]henever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony . . . the jury may consider the 'nature of the underlying felony and the circumstances surrounding its commission.'"). "[B]ecause it can be difficult to prove a defendant's state of mind . . . minimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, the evidence demonstrated that defendant, armed with a gun, participated with Bostick and a third armed man in a robbery of Shannon under the guise of purchasing marijuana. In response to Bostick's demand for the location of additional marijuana, Shannon denied having any more marijuana, but Lanier, who was being held at gunpoint, claimed that there was more in an upstairs apartment. Upon leaving to search for the marijuana, Bostick threatened that if the marijuana was not there, he would call defendant and instruct him to shoot Lanier. Defendant, still armed with a gun, remained in the apartment with Shannon and Lanier. When defendant's telephone subsequently rang, Lanier immediately got up. It may reasonably be inferred from this evidence that Lanier believed that defendant intended to carry out Bostick's

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214; 612 NW2d 144 (2000). Nonetheless, even without the addition of a special cautionary instruction to limit any potential for any prejudice, defendant has not shown any substantial harm as a result of the jurors' conduct. *Messenger*, 221 Mich App at 175.

threat, so he initiated a physical struggle with defendant as an act of self-preservation. The struggle, which was intense enough to disrupt furniture in the apartment, migrated onto the sixth-floor balcony and, after continued skirmishing, Lanier went over the balcony. From this evidence, a rational trier of fact could reasonably infer that defendant intentionally set in motion a force likely to cause death or great bodily harm when he participated in an armed robbery with two other armed men, held Lanier at gunpoint while waiting to receive word on whether he should shoot Lanier, and, after receiving a call, struggled with Lanier on a sixth-floor balcony, during which Lanier went over the balcony rail and fell to his death.

Although defendant argues that different inferences could be drawn from the evidence, it is the jury's role to determine what inferences can be fairly drawn from the evidence. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). The evidence was sufficient to support defendant's conviction of first-degree felony murder.

III. SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES

Defendant argues that evidence relating to Shannon's identification of him should not have been admitted at trial because it was based on suggestive pretrial identification procedures. Specifically, defendant claims that his photographic array was impermissibly suggestive because it was the same photographic array that the police used for Bostick, which Shannon had viewed previously, with the exception that the police switched the two defendants' photographs. Defendant maintains that this procedure thereby suggested defendant's identity to Shannon.

Because defendant did not object below to the photographic array or to Shannon's in-court identification, this issue is unpreserved and we review the issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). The fairness or suggestiveness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be sufficiently independent to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995) (citations omitted).

Given the totality of the circumstances in this case, we conclude that the photographic array at issue was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. Initially, defendant admits that Shannon did not positively identify him in the photographic lineup, which tends to undercut defendant's assertion that the photographic array impermissibly suggested defendant as the perpetrator. Further, the five other participants in the photo array were rearranged with defendant appearing in position six while Bostick had been in

position four. In addition, perhaps most notably, the timing of the two arrays refutes defendant's claim that Shannon identified him based on the similarities in the two photograph arrays. Specifically, Shannon viewed Bostick's photographic array in January, and he did not view defendant's photographic array until eight months later in September, at which time he failed to identify defendant. Considering the totality of the circumstances, it is not plainly apparent that the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. Having concluded that the pretrial identification procedure was not unduly suggestive, we need not consider whether there was an independent basis for Shannon's in-court identification. See *Barclay*, 208 Mich App at 675-676.

IV. MOTION TO SUPPRESS EVIDENCE

Defendant next argues that the trial court erred in denying his motion to suppress evidence, including telephone records, related to his cellular telephone. According to defendant, police conducted an unlawful warrantless search of his cellular telephone when, after defendant had been arrested for an unrelated offense, and while his cellular telephone was in police storage, police turned on defendant's telephone and called the number listed on defendant's detention sheet to confirm that the number matched defendant's telephone. In view of this conduct, defendant maintains that his Fourth Amendment rights were violated and the exclusionary rule required suppression of his cellular telephone records.

When reviewing a trial court's decision on a motion to suppress evidence, we review the trial court's findings of fact for clear error and review its ultimate decision whether to suppress the evidence de novo. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). We also review de novo the question whether a Fourth Amendment violation occurred and whether an exclusionary rule applies. *Id.*

The United States and the Michigan Constitutions prohibit unreasonable searches and seizures. US Const Am IV; Const 1963, art 1, § 11. The Fourth Amendment generally requires the police to secure a warrant before conducting a search. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999) (quotation marks and citation omitted). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652, 1656; 80 L Ed 2d 85 (1984). The lawfulness of a search or seizure depends upon its reasonableness, which requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v Moore*, 553 US 164, 171; 128 S Ct 1598; 170 L Ed 2d 559 (2008) (citation omitted). See also *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Whether a search is reasonable depends on the totality of the circumstances. *Florida v Harris*, ___ US ___, ___; 133 S Ct 1050, 1055; 185 L Ed 2d 61 (2013); *People v Collins*, 298 Mich App 458, 467; 828 NW2d 392 (2012). "As a general rule, searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the police conduct falls under one of the established exceptions to the warrant requirement." *Beuschlein*, 245 Mich App at 749. Relevant to the present case, the United States Supreme Court recently held that police officers "must generally secure a warrant" before searching the data on cellular telephones belonging to recently arrested individuals. *Riley v California*, ___ US ___, ___; 134 S Ct 2473, 2485; 189 L Ed 2d 430 (2014).

Here, defendant does not challenge that his cellular telephone and number, which were part of his personal effects, were lawfully seized during the booking procedure and jailing. As the trial court recognized, thereafter, the police were lawfully privy to the cellular telephone number that had been provided by defendant and listed on the detention sheet. Defendant's constitutional argument is based on the fact that his cellular telephone was turned on, called, and then turned off immediately after it rang. However, at no time were the contents of the telephone searched. Instead, the police did nothing more than verify that the cellular telephone number provided to them by defendant matched his cellular telephone. Under the circumstances, the limited action of briefly turning on defendant's cellular telephone, which was already lawfully in the possession of the police, to confirm that the reported number that the police had lawfully obtained from defendant actually matched the cellular telephone, was not unreasonable. Simply put, confirming the telephone number that defendant had already provided is not an invasion of the type of "sensitive personal information" requiring a search warrant. See *Riley*, 134 S Ct at 2490. See also *State v DeFranco*, 426 NJ Super 240, 250; 43 A3d 1253 (2012) (finding no expectation of privacy in telephone number that the defendant had voluntarily revealed to others). Consequently, this minimal intrusion did not violate defendant's Fourth Amendment rights. Cf. *United States v Flores-Lopez*, 670 F3d 803, 810 (CA 7, 2012) (concluding search of cellular telephone, to ascertain telephone's number, was reasonable given the "trivial" nature of the information involved and the fact that such information "can be found without searching the phone's contents").

Moreover, given that defendant freely provided police with his cellular telephone number and that police already had Bostick's telephone records which showed calls to defendant's telephone, application of the exclusionary rule to bar admission of his cellular telephone records would be inappropriate in this case under the independent source doctrine. Cf. *Williams v State*, 216 Md App 235, 248; 85 A3d 367 (2014). See also *People v Potra*, 191 Mich App 503, 508; 479 NW2d 707 (1991) ("[T]he exclusionary rule is not applicable when the government learns of evidence from an independent source."). In short, the trial court did not err in denying defendant's motion to suppress.

V. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional constitutional and ineffective assistance of counsel issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We have reviewed defendant's arguments, and we find his claims to be without merit.

A. RIGHT OF CONFRONTATION

Defendant argues that he was denied his right of confrontation because he did not have the opportunity to cross-examine several witnesses about their statements. As discussed below, defendant waived objection to some of the evidence when its admission was approved by his counsel. While defendant objected to some of the other statements in question, he did not specifically challenge the statements or argue that reference to the statements violated his constitutional right of confrontation, meaning that his present arguments are unpreserved. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) ("[A]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.").

Accordingly, we review these unpreserved arguments for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

A. 911 CALLS AND DOLEDA NUNOO'S POLICE STATEMENT

During trial, 911 calls were admitted in evidence and played for the jury. When the prosecutor moved to admit the 911 calls, defense counsel specifically indicated that he had "no objection" to their admission. An officer and a detective also both testified regarding a written statement that Doleda Nunoo had made to the police. When the prosecutor moved to admit Nunoo's statement, defense counsel stated, "no objection." Defendant now argues that he is entitled to a new trial because the admission of the 911 calls and Nunoo's statement violated his constitutional right of confrontation. However, by specifically acquiescing to the admission of this evidence, defendant waived appellate review of this issue. *Carter*, 462 Mich at 214-216. See also *People v Buie*, 491 Mich 294, 313; 817 NW2d 33 (2012) (recognizing counsel may waive a defendant's right to confrontation). A waiver extinguishes any error, leaving no error to review. *Carter*, 462 Mich at 214-216.

B. BOSTICK'S STATEMENTS

1. BOSTICK'S STATEMENTS INTRODUCED THROUGH SHANNON

Defendant argues that in response to the prosecutor's questions, Shannon impermissibly offered testimonial hearsay statements attributed to Bostick, which violated his right of confrontation. Defendant challenges the following emphasized remarks made during direct examination:

> *Q.* What does Mr. Bostick say when you say what—
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> *A.* So I looked at him—like when he drew the gun I was just in shock . . . . I was looking at him like what's going on, like for real, and *he was like, man, I've got to have it, you know*.
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> * * *
>
> *A.* So I'm struggling with [Bostick]. So he basically like *man, chill out, you know, chill out, man, quit[] struggling, you know we ain't gonna do nothing; quit—chill . . . chill, you know, and he's like if you keep on struggling, you know what I'm saying somebody gonna get popped*, you know, so—
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> * * *
>
> *A.* Okay, so after—after that he like, you know, he like just -- *just chill out, chill out. So we [sic] asked him where the other weed at*—so I'm like there ain't no more weed, you know, this—this basically—this is it, you know, so he asked—he started asking [Lanier], you know, like *where the rest of the weed*, you know—
>
> * * *

> *A.* So I was trying to tell [Bostick], I was like there ain't no more weed up there, so—Lanier was telling him, yeah, there's some upstairs, you know, he was, you know, panicking, you know, so [Bostick] said well *I'm going to go upstairs and I'm going to go look, and if ain't no weed there when I get down—when I get up there I'm going to call [defendant] downstairs and tell him to pop you*.
>
> * * *
>
> *A. He said when I go upstairs and I go up there, if I don't find no weed up there, you're lying, I'm going to call downstairs and I'm going to tell my man to pop you.* [Emphasis added.]

Both the United States and the Michigan Constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012); see also US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). If a statement is not testimonial, however, the Confrontation Clause is not implicated. *People v Taylor*, 482 Mich 368, 377-378; 759 NW2d 361 (2008). "The [United States] Supreme Court has not provided a definitive definition of 'testimonial,' but a statement 'procured with a primary purpose of creating an out-of-court substitute for trial testimony' is the quintessential example of testimonial hearsay." *United States v Palacios*, 677 F3d 234, 243 (CA 4, 2012) (citation omitted). Stated differently, a "pretrial statement is testimonial if the declarant should have reasonably expected the statement to be used in a prosecutorial manner and the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Jackson*, 292 Mich App 583, 594-595; 808 NW2d 541 (2011).

In this case, the challenged statements, which lacked any type of legal formality, were not testimonial. The out-of-court statements were made informally to either an acquaintance or an acquaintance's associate, not during a police interrogation or other formal proceeding. See *Taylor*, 482 Mich at 378; *People v Bennett*, 290 Mich App 465, 483; 802 NW2d 627 (2010). Furthermore, Bostick's statements during the robbery were not made under circumstances that would have caused an objective witness to believe that the statements would be available for use at a later trial. In addition, defendant was charged and convicted of conspiracy to commit armed robbery, and statements made in furtherance of a conspiracy are examples of statements that by their nature are not testimonial. *Crawford*, 541 US at 56. The contested statements were not testimonial and, therefore, the testimony did not violate defendant's right of confrontation under *Crawford*.

2. BOSTICK'S STATEMENT IDENTIFYING DEFENDANT

Defendant argues that admission of police testimony that Bostick gave the police defendant's name violated defendant's right of confrontation. "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. "However, the Confrontation Clause does not bar the use of out-of-court testimonial

statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11. See also *Crawford*, 541 US at 59 n 9. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. "Specifically, a statement offered to show why police officers acted as they did is not hearsay." *Id.*

Bostick's statement was not offered to prove the truth of the matter asserted, i.e., to prove the truth of Bostick's statement during the interview. Rather, the statement was offered to provide context for understanding the course and chronology of the police investigation. The statement explained why the police began focusing on defendant as a suspect. Because the statement was used for the limited purpose of providing context for the police investigation and not to prove the truth of the matter asserted, it was not hearsay, or a statement of an absent declarant such that defendant's confrontation rights were violated. See *id.*

C. STATEMENTS OF DEFENDANT'S MOTHER

Defendant contends that in response to the prosecutor's questions, Detective Hancock impermissibly offered testimonial hearsay statements attributed to defendant's mother during the following portions of his testimony on direct examination:

> *Q.* You didn't gain any information; is that correct?
>
> *A. I did on the vehicle.*
>
> *Q.* All right. That was—the vehicle was registered to the mother; is that correct?
>
> *A.* Yes.
>
> *Q.* All right. And did you gain information that it was possibly used by the Defendant?
>
> *A. She said that he uses it.* [Emphasis added.]

Defendant does not specifically argue why his mother's statement about his use of her vehicle was prejudicial. During trial, the prosecutor's questions and resulting testimony were intended to explain background information regarding the course and propriety of the police investigation that ultimately led to arresting defendant. Defendant's mother told the detective that defendant sometimes uses her car, but made no reference to the date of the incident. Because the statement was presented for the limited purpose of providing background information about the police investigation, it did not constitute hearsay, or a statement of an absent declarant such that defendant's confrontation rights were violated. Moreover, the fact that defendant's mother stated that defendant sometimes used her car provided little, if any, insight concerning defendant's actions on the date in question and was of little importance. Therefore, the statement did not affect defendant's substantial rights. *Carines*, 460 Mich at 764. Defendant was not denied his right of confrontation by the admission of the challenged evidence, and he has not shown plain error.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant also argues that defense counsel was ineffective for failing to object to the previously discussed evidence that defendant contends was inadmissible testimonial hearsay.

Because defendant failed to raise his ineffective assistance of counsel claims in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review of these claims is limited to mistakes apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Id.*; *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Decisions regarding whether to object to evidence and what arguments to present are typically considered matters of trial strategy. See *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008); *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Counsel has wide discretion in matters of trial strategy, *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012), and "this Court will not second-guess defense counsel's judgment on matters of trial strategy," *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

In this case, defendant argues that defense counsel was ineffective for failing to object to the evidence that defendant contends was inadmissible testimonial hearsay. With regard to the 911 calls, defendant has not overcome the strong presumption that defense counsel's decision not to challenge that evidence was within the range of reasonable professional conduct. It is apparent that defense counsel made a tactical decision to use the 911 calls as support for his argument that Shannon was a witness who should not be believed. In opening statement, defense counsel stated:

> A very short time later, [a witness] sees Shannon, her neighbor, who she knows, kneeling aggressively over the body, pointing the finger in Lanier's face. Now here's a poor man that's dying, Shannon is there pointing his fingers at this man's face. Doesn't try to help him. *Even—even lies to the police in these 911 calls. And you're—you're going to hear that.* [Emphasis added.]

Among other things, the 911 calls revealed that Shannon's friend "Chris" called on behalf of Shannon and told the 911 dispatcher that Shannon told him that someone was chasing him with a gun. On cross-examination, defense counsel used the 911 call to impeach Shannon's testimony that he told Chris "exactly what happened that day," i.e., "what happened to Lanier" and "that we got robbed." While Shannon denied telling Chris that he was being chased with a gun, he admitted that Chris would not have a reason to "make up a [911] call." In closing argument, defense counsel argued:

> Shannon, I am a victim. No calls to 911. He called his friend Chris. I was robbed. There's no proof of a robbery. I was chased by gunmen. No witness or surveillance cameras saw Shannon being chased by gunmen. There's nothing there.

In short, counsel plainly had a strategy for the use of the 911 calls, and the record does not show that defense counsel's strategy regarding the 911 calls was objectively unreasonable or prejudicial to defendant.

Although defense counsel failed to object to witness Nunoo's written police statement, defendant has not shown that counsel's failure to object was objectively unreasonable, or that he was prejudiced by the evidence. As plaintiff accurately observes, Nunoo's statement was cumulative to the testimony of other witnesses who testified at trial, and was consistent with the police testimony that the physical evidence in Shannon's apartment evidenced the occurrence of a struggle. On this record, defendant has not shown that, but for counsel's inaction, the result would have been different.

We also reject defendant's argument that counsel was ineffective for failing to object to the previously discussed statements by Bostick and defendant's mother, the introduction of which allegedly violated defendant's right of confrontation. As previously explained, the introduction of this evidence was not plain error. That is, as discussed, neither Bostick's statements nor those of defendant's mother implicated the confrontation clause, meaning an objection by counsel on this basis would have been futile and counsel is not ineffective for failing to offer a futile objection. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Accordingly, defendant has not shown that counsel's failure to object was objectively unreasonable, or that he was prejudiced by the references. *Armstrong*, 490 Mich at 289-290. Consequently, defendant has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Joel P. Hoekstra